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No. 90-773

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

SOUTH RIDGE BAPTIST CHURCH,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF OHIO,

and

OHIO BUREAU OF WORKERS' COMPENSATION,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether application of the Ohio Workers' Compensation Act to churches which meet the statutory definition of an 'employer' violates the Religion Clauses of the First Amendment.

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Respondents Industrial Commission of Ohio and Ohio Bureau of Workers' Compensation respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth District's opinion in this case. That opinion is reported at 911 F. 2d 1203 (1990).

STATEMENT OF THE CASE

Respondents adopt and incorporate by reference the statement of facts contained in the opinion below of the United States Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

THE COURT HAS PREVIOUSLY DENIED CERTIORARI TO A PETITIONER IN SUBSTANTIALLY IDENTICAL CIRCUMSTANCES.

The case of *Victory Baptist Temple v. Industrial Commission,* 2 Ohio App. 3d 418, 442 N.E.2d 819 (1982), *cert. denied,* Ohio Case No. 82-768 (June 30, 1982), cert. denied, 459 U.S. 1086 (1982), arose as an action seeking both a declaration that the provisions of the Ohio Workers' Compensation Act, Ohio Rev. Code Ann. 4123.01 *et seq.,* were unconstitutional as applied to plaintiff therein, and an injunction against defendants Industrial Commission of Ohio and Ohio Bureau of Workers' Compensation from enforcing the workers' compensation laws against the plaintiff.

The Ohio Court of Appeals in *Victory Baptist Temple* upheld the trial court's allowance of summary judgment in favor of defendants therein, finding that application of the Ohio Workers' Compensation laws violated neither the Establishment nor Free Exercise Clauses of the First Amendment. The court based its opinion upon review and application of this Court's holdings in *United States v. Lee,* 455 U.S. 252 (1982), and *Sherbert v. Varner,* 374 U.S. 398 (1963), among others. Victory Baptist Temple's petition for a writ of certiorari was denied by this Court on December 13, 1982.

The operative facts, issues of law and defendants in *Victory Baptist Temple* were identical to those now presented by Petitioner in the case at bar.

THE DECISION BELOW, THAT THE GENERALLY APPLICABLE RECORD KEEPING AND REPORTING REGULATIONS OF THE OHIO WORKERS' COMPENSATION ACT DO NOT FOSTER EXCESSIVE ENTANGLEMENT WITH RELIGION WHEN APPLIED TO CHURCH EMPLOYERS, IS CONSISTENT WITH AN UNBROKEN LINE OF THIS COURT'S DECISIONS.

Petitioner argues that this Court has yet to rule specifically on this issue, and that the lack of such ruling, "has had and will continue to have pervasive and wide-ranging effects upon the delicate balance between church and state." (Petition, p. 5).

The requirements imposed on an employer by the Ohio Workers' Compensation Act include reporting of the number of employees and aggregate wages, Section 4123.26; reporting job-related injury or illness, Section 4123.28; and making limited records relating to payroll and wage expenditures available for inspection, Section 4123.23. Any potentially greater degree of intrusion occurs only when an employer refuses to comply with the above requirements, or fails to pay premiums.

As the District Court below noted, at 676 F.Supp. 807:

> Courts have found similar or greater reporting and inspection requirements to be constitutionally permissible. See e.g. *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985) (minimum wage, overtime and recordkeeping requirements of the Fair Labor Standards Act upheld); *Bethel Baptist Church v. United States, supra* at 1087 (reporting and inspection requirements under social security laws upheld); *United States v. Coates,* 692 F. 2d 629 (9th Cir. 1982) (inspection of records by IRS upheld).

The only case referred to by Petitioner as conflicting "in principle" with the decision of the Sixth Circuit in the case at bar is *Surinach v. Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979). Unlike the case at bar, the extraordinarily broad and pervasive language of the regulations in *Surinach* permitted the state "to intrude upon decisions of religious authorities as to how much money should be expended and how funds should best be alloted to serve the religious goals of the schools." 604 F.2d at 79. Further, and again as distinguished from the case at bar, the defendant in *Surinach* did not show, or even attempt to show, a "compelling state interest" justifying the regulation involved. 604 F.2d at pp. 79-80. *Surinach* is thus readily distinguished, both on the nature and scope of the intrusion involved, and the nature of the government interest asserted, from the case at bar.

Petitioner's claim that the continued inclusion of churches in Ohio's long-standing workers' compensation system will result in "direct confrontations and conflicts" between the church and state is not borne out by history or reason. The interaction between church employers and the agencies charged with carrying out the purposes of the Ohio Workers' Compensation Act is limited, specific, and presents no potential for interference with church decisions regarding doctrine, worship, or church-affiliated education. There is no showing that the inclusion of churches in Ohio's workers' compensation system since 1913 has met any widespread or recurrent opposition by Ohio churches. In light of the above, and of the accomodation made by the Ohio legislature allowing churches to exempt ministers as "employees," if desired, Chapter 4123.01(A)(2)(a), the questions presented by Petitioner do not demonstrate the need for further review.

THIS COURT'S RECENT DECISION IN EMPLOYMENT DIVISION V. SMITH DOES NOT AFFECT THE OUTCOME OF THE CASE AT BAR OR RAISE THE QUESTIONS PRESENTED BY PETITIONER.

In *Employment Division v. Smith,* ____ U.S. ____ , 108 L. Ed 2d 876 (1990), this Court addressed the question of whether the Free Exercise Clause permitted a state to include

religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus would permit the state to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. 108 L. Ed. 2d at 882. To the facts presented, the majority in *Smith* applied the long-standing principle that, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *United States v. Lee*, 455 U.S. 252, 263, n 3 (1982) (STEVENS, J., concurring in judgment);" 108 L. Ed. 2d at 886. The majority declined to apply the *Sherbert* test, with its further requirement of the showing of a "compelling governmental interest," and speculated, without any specific holding, that the *Sherbert* test today may have little or no application outside the unemployment compensation field. 108 L. Ed. 2d at 888-889.

Petitioner's invitation to the Court to apply the *Smith* standard to the case at bar is an exercise with no potential benefit for Petitioner, who has conceded at every level that the Ohio Workers' Compensation Act is a 'valid and neutral law of general applicability.' Petitioner apparently believes that its position would fall under a "hybrid situation" exception discussed in *Smith* at 108 L. Ed. 2d 887-888, an argument not only not raised by Petitioner at any point below, and difficult to imagine here in reference to the case examples given in *Smith*, but which only leads back to the *Sherbert* test, the standard which was actually used by the Sixth Circuit in its decision below.

Petitioner's apparent purpose in asking this Court to render what would amount to an advisory opinion is to reach the third of its Questions Presented for Review:

> "(3.) Whether the courts below should have required the state to prove a compelling state interest and to prove that the Act was the least restrictive means of accomplishing that interest, instead of compressing the 'means' analysis into

the 'interest' prong of the traditional test."

In the first part of this question, Petitioner again attempts to raise an issue not presented in the courts below, where it clearly conceded that the Ohio workers' compensation program advances a compelling state interest. 911 F.2d at 1206; 676 F.Supp. at 804.

The Sixth Circuit's analysis of *Lee, supra*, correctly held that the state's interest in maintaining uniform support of a comprehensive health and safety program such as workers' compensation, as with the social security system in *Lee*, was of such a high order that the state need go no further than showing its compelling interest to dispatch any free exercise challenge. The court below went on to cite, "*Lee's* teaching that accomodation of religious objections to taxation is a legislative task," and note Ohio's legislative accomodation in providing for voluntary exemption of ministers from the definition of "employees" for whom premiums must be paid. 911 F2d at 1208-1209.

The application of *Smith* to this case cannot support Petitioner's cause, and would therefore result in a merely advisory opinion by the Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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